89-590

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1989

DUANE WILKINSON,

Petitioner,

v.

SAFEWAY STORES, INCORPORATED, A Delaware Corporation, LESTER COLLINS, and THOMAS BRADDY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In determining whether or not petitioner's state law tort claims are preempted by Section 301 of the Labor Management Relations Act, is the dispositive inquiry whether said claims *"require"* the interpretation of a collective bargaining agreement [as set forth in *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988)] or whether said claims are *"substantially dependent upon"* the interpretation of a collective bargaining agreement [as set forth in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)]?

2. Assuming *arguendo* that Section 301 preemption would otherwise apply to defeat petitioner's state law tort claims, is petitioner nonetheless entitled to proceed with his claims upon a finding of a public policy exception [as set forth in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985)], even though such a finding might "require" or be "substantially dependent upon" an interpretation of the collective bargaining agreement?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, DUANE WILKINSON, and the respondents, SAFEWAY STORES, INCORPORATED, LESTER COLLINS and THOMAS BRADDY.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, DUANE WILKINSON, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on July 11, 1989.

OPINION BELOW

The Memorandum Decision of the Court of Appeals for the Ninth Circuit has not been reported. It is reprinted in the Appendix hereto, Page 1A, *infra*.

JURISDICTION

On October 21, 1987, petitioner filed this suit in the Superior Court of the State of California, for the County of San Bernardino, alleging seven tort causes of action under California law. On November 23, 1987, respondents removed the case to the United States District Court, pursuant to 28 U.S.C. § 1441(b).

On November 24, 1987, respondents filed a Motion to Dismiss Petitioner's Complaint on the ground that each and every cause of action failed to state a claim upon which relief could be granted, pursuant to Rule 12(b)(6). The District Court granted respondents' motion and dismissed petitioner's Complaint.

On petitioner's appeals, the Ninth Circuit, on July 11, 1989, entered a judgment and opinion affirming the District Court's order, and directing that petitioner's Complaint be dismissed on the ground that all of the state law tort claims contained therein were preempted by Section 301 of the Labor Management Relations Act [29 U.S.C. § 185]. No petition for rehearing was sought.

Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 185. *Suits by and against labor organizations.* The entire statute is reprinted in the Appendix hereto, Page 14A, *infra.*

STATEMENT OF THE CASE

Petitioner first began working for respondent, SAFEWAY, on December 21, 1959. In and about January of 1987, petitioner was employed as a meat cutter pursuant to a Collective Bargaining Agreement between respondent, SAFEWAY, and United Food and Commercial Workers Union, Local No. 439.

During January of 1987, petitioner became aware that his co-worker and immediate supervisor, respondent, THOMAS BRADDY, was embezzling money from respondent, SAFEWAY, in that he observed respondent, BRADDY, falsifying his time cards, indicating thereon that he was at work at respondent's store during hours in which he was not actually working, and, in fact, was not even in the store, and that he was nonetheless receiving payment for those hours.

On or about January 30, 1987, petitioner, out of loyalty developed over his many years with SAFEWAY, approached his store manager, respondent, LESTER COLLINS, in confidence, and advised him of the aforementioned activities of respondent, BRADDY. Respondent, COLLINS, assured petitioner that the matter would be properly and competently handled in the strictest of confidence.

Despite these assurances, respondent, COLLINS, confronted respondent, BRADDY, directly with the aforementioned information, advising respondent, BRADDY, that petitioner had learned of his illegal behavior. Immediately thereafter, respondents set about on a course of action designed to demean, humiliate, intimidate, degrade, belittle, disgrace, and ridicule petitioner for the purpose of punishing petitioner for his aforementioned act of honesty and loyalty, and with the further motive of forcing petitioner to leave his employment with respondents.

As a result of the aforementioned acts of respondents, petitioner became violently ill and was required to employ the services of a physician and to miss time from work. On certain occasions, petitioner was actually afraid to go to work because of the behavior of respondents.

Petitioner thereafter approached his union representative and informed him of the situation. Petitioner was advised that similar situations had occurred in the past and that the grievance procedure was found totally ineffective in dealing with the problem. Petitioner inferred from this that the grievance procedures would prove to be ineffective in his case as well.

Thereafter, petitioner requested a transfer to another store of respondents. For unknown and unspecified reasons, the request for transfer was refused.

On February 13, 1987, petitioner was finally forced to leave the employ of respondents after some 27 years of loyal service.

On October 21, 1987, petitioner filed this suit in the Superior Court of the State of California, for the County of San Bernardino, against respondents. The Complaint alleged seven tort causes of action under California law: Breach of Contract (wrongful discharge), Breach of the Covenant of Good Faith and Fair Dealing, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Negligence, Fraud and Deceit, and Civil Conspiracy.

On November 23, 1987, respondents removed the suit to the United States District Court, pursuant to 28 U.S.C. § 1441(b).

On November 24, 1987, respondents filed a Motion to Dismiss Petitioner's Complaint on the ground that each and every cause of action failed to state a claim upon which relief could be granted. The District Court, applying the artful pleading doctrine, found that all of the causes of action contained in petitioner's Complaint were in fact causes of action under Section 301 of the Labor Management Relations Act [29 U.S.C. § 185], and therefore subject to removal. Having assumed jurisdiction, the District Court then dismissed petitioner's Complaint on the grounds that each and every cause of action was preempted by Section 301 of the Labor Management Relations Act, and therefore failed to state any facts upon which relief could be granted.

In due course, petitioner took appeals to the Ninth Circuit from the judgment and order dismissing his Complaint. Petitioner invoked the Ninth Circuit's jurisdiction under 28 U.S.C. § 1291 to review "final decisions" of the District Court.

The Ninth Circuit thereupon addressed the preemption issue and, like the District Court, rejected petitioner's contention that his Complaint set forth well-pleaded state law tort claims, and was therefore not preempted by Section 301 of the Labor Management Relations Act.

In reaching its decision, the Ninth Circuit reasoned, despite its *admission* that "the Supreme Court has said [in *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877, 1885 (1988)] that the *dispositive inquiry* is whether applying state law 'requires the interpretation of a collective bargaining agreement'"; that it would nonetheless "accomodatingly" apply not only this test but one previously *"suggested"* by the Supreme Court [in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985)], i.e., whether applying state law "is substantially dependent upon analysis of the terms of a[] [collective bargaining] agreement. . . ." [Page 4A, *infra*. Emphasis added.]

Further, the Ninth Circuit, though "not prepared to accept" the District Court's *rejection* of petitioner's argument that a public policy exception (embodied in California's penal statutes) existed to prevent preemption, nonetheless refused to decide the issue because it believed that in order to do so it would necessarily be required to interpret the terms of the collective bargaining agreement.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Memorandum Decision affirming the District Court's order of dismissal conflicts with decisions of this Court and other Circuits.

In affirming the District Court's order of dismissal, the Ninth Circuit admitted that "the Supreme Court has said [in *Lingle, supra*] that the *dispositive inquiry* is whether applying state law 'requires the interpretation of a collective bargaining agreement'". [Page 4A, *infra*. Emphasis added.] However, it then applied another test which it likewise admitted was only previously "suggested" by the Supreme Court in *Allis-Chalmers, supra*, that is whether applying state law is substantially dependent upon analysis of the collective bargaining agreement. [Page 4A, *infra*]. Petitioner submits that such analysis directly conflicts with this Court's holding in *Lingle*.

In *Lingle*, a unanimous Supreme Court held that:

> "an application of state law is preempted by § 301 of the Labor Management Relations Act of 1947 *only* if such application *requires* the interpretation of a collective bargaining agreement." [*Lingle, supra*, at 1885. Emphasis added.]

This Court reasoned, in words particularly relevant to the Ninth Circuit's decision, that even though:

> "the state-law analysis might well involve attention to the same factual considerations as a contractual determination of whether [an employee] was fired for just cause, . . . such parallelism [does not] render the state-law analysis dependent upon the contractual analysis.

> For while there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject matter of the law in question, § 301 pre-emption merely insures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the statelaw claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." [*Lingle, supra,* at 1883.]

Despite this Court's holding in *Lingle,* as aforesaid, the Ninth Circuit has refused to solely apply the test articulated therein, and has instead embarked on an avenue of strained logic, apparently contending that simply because the facts alleged in petitioner's state law tort claims *could* be at issue in a Section 301 action, petitioner is thus preempted from pursuing such claims in the Superior Court of the State of California. Such logic cannot be allowed to stand for petitioner or any other similarly situated litigant. Plenary consideration of this matter by this Honorable Court is therefore essential.

Petitioner cannot conclude this point without conveying to this Honorable Court his sincere belief that his state law tort claims, set forth in his Complaint originally filed in the Superior Court of the State of California for the County of San Bernardino, do not require, nor are they substantially dependent upon, an interpretation of the collective bargaining agreement, as petitioner can

prove said claims in the Superior Court without any reference whatsoever to the collective bargaining agreement.

II.

The Ninth Circuit's refusal to extend the public policy exception enunciated in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985), to include the public policies embodied in a State's penal statutes, raises important and unresolved problems, and conflicts with other decisions of the Ninth Circuit.

Until the Ninth Circuit decided this case, it was well established that a discharge from employment which violates public policy is *not* preempted by Section 301 of the Labor Management Relations Act. [*Garibaldi, supra,* at 1375.] In fact, this well-founded public policy exception was applied and reinforced by the Ninth Circuit in *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987) *cert. denied*, 108 S.Ct. 2819 (1988).

Despite its own precedent, the Ninth Circuit refused to find that petitioner's state law tort claims were *not* preempted, even though it was "not prepared to accept" the District Court's *rejection* of petitioner's argument that a public policy exception (embodied in California's penal statutes) existed to prevent preemption. Instead of applying *Garibaldi* and *Paige*, the Ninth Circuit chose to once again embark on an avenue of strained logic, apparently contending that in order to determine whether a public policy exception was applicable, it would necessarily be required to interpret the collective bargaining agreement,

and, therefore, pursuant to *Lingle* and *Allis-Chalmers* petitioner's state law tort claims were preempted. [Page 11A, *infra.*] Lower courts, particularly the Ninth Circuit, need guidance from this Honorable Court as to the applicability of the public policy exception to the preemption doctrine.

As with the aforementioned, petitioner cannot conclude this point without conveying to this Honorable Court his sincere belief that his state law tort claims, set forth in his Complaint originally filed in the Superior Court of California for the County of San Bernardino, are not preempted, because a public policy exception (embodied in California's penal statutes) does in fact exist in this case, and its establishment does not require an interpretation of the collective bargaining agreement.

CONCLUSION

Petitioner respectfully submits that for the reasons set forth herein, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DUANE L. WILKINSON,
Plaintiff-Appellant,
v.
SAFEWAY STORES, INC.; LESTER COLLINS; THOMAS BRADDY, and DOES 1 through 100, Inclusive,
Defendants-Appellees.

No. 88-5676

DC# CV-87-7855-JSL

*MEMORANDUM**

(Filed July 11, 1989)

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding
Argued and Submitted May 5, 1989
Pasadena, California

Before: SNEED, REINHARDT, and BRUNETTI, Circuit Judges.

Wilkinson appeals the district court's order dismissing his complaint on the ground that it was preempted by § 301 of the Labor Management Relations Act (LMRA). *See* 29 U.S.C. § 185 (1982). We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I.

FACTS AND PROCEEDINGS BELOW

Wilkinson was a meat-cutter employed by Safeway for twenty-seven years in Big Bear, California. He sued Safeway and several of its employees (hereinafter collectively referred to as Safeway) in California state court alleging that he "was forced to leave" his job as a consequence of the tortious actions of two Safeway employees, Lester Collins and Thomas Braddy. Wilkinson alleges that he discovered Braddy, his immediate supervisor, falsifying his time cards in order to receive pay for hours that he did not work. Wilkinson reported these observations to Collins, the store manager, and asked that their conversation be kept confidential. It appears this was not done inasmuch as Braddy later confronted Wilkinson. Wilkinson alleges that after this incident "Braddy and Collins set out on a course of action designed to demean, humiliate, intimidate, degrade, belittle, disgrace, and ridicule Wilkinson. . . ." Wilkinson alleges that he suffered severe emotional distress as a consequence of Collins' and Braddy's actions and that eventually, after a transfer to another store was refused, he was "forced to leave." Safeway suggests that Wilkinson was discharged. Wilkinson was a member of Local 439 of the United Food and Commercial Workers Union (the Union). There was a collective bargaining agreement in effect between Safeway and the Union. Safeway contends that none of the allegations about Braddy's theft are in the record below and therefore should not be considered by this court.

Safeway removed this action to federal court and moved to dismiss the complaint, arguing that all of Wilkinson's claims were preempted by § 301 of the LMRA. The district court agreed.

II.

JURISDICTION

Wilkinson originally filed this action in California state court. Safeway, as already pointed out, removed the action under 28 U.S.C. § 1441(b) (1982). Because Wilkinson's complaint did not raise a federal question on its face, removal was proper only if Wilkinson's claims were completely preempted by federal law. *See Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2430 (1987). This court has jurisdiction under § 1291.

III.

STANDARD OF REVIEW

Whether a plaintiff's cause of action is preempted by federal law is a question of law that is reviewed de novo. *Bale v. General Tel. Co.*, 795 F.2d 775, 778-79 (9th Cir. 1986).

IV.

SECTION 301 PREEMPTION

Section 301 provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States. . . ." 29 U.S.C. § 185(a) (1982). A suit alleging the breach of a

collective bargaining agreement is governed exclusively by § 301. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). The Supreme Court has announced two different standards for determinating whether § 301 controls. Instead of deciding whether the "two tests do in fact differ," we have, accommodatingly, applied both. *See Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1147 (9th Cir. 1988). Most recently, for example, the Supreme Court has said that the dispositive inquiry is whether applying state law "requires the interpretation of a collective bargaining agreement." *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877, 1885 (1988). Previously, on the other hand, the Court suggested that a state claim is preempted if it "is substantially dependent upon analysis of the terms of a[ ] [collective bargaining] agreement. . . ." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). While these tests may not be identical, they do share considerable common ground.

We must begin by examining Wilkinson's complaint. In it he alleged seven causes of action: breach of contract, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, fraud and deceit, and conspiracy. We will address each cause of action in turn.

A. *Breach of Contract*

Wilkinson's first cause of action is for breach of contract. In this portion of his complaint, Wilkinson explicitly acknowledges that he was covered by the collective bargaining agreement between the Union and Safeway.

He also incorporates the specific terms of that agreement into his complaint, alleging that the contract provided that he would be discharged only for good cause. The collective bargaining agreement is also an exhibit attached to his complaint. By specifically alleging that Safeway breached the collective bargaining agreement, Wilkinson's claims not only will require, but also are dependent on, an interpretation of its terms. As a consequence, this claim is preempted. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 998 (9th Cir. 1987); *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 667 (9th Cir. 1985).

B. *Breach of Covenant of Good Faith and Fair Dealing*

In his second cause of action, Wilkinson alleges that Safeway tortiously breached the covenant of good faith and fair dealing in his employment contract. As the employment contract between Wilkinson and Safeway is the collective bargaining agreement from which the covenant must spring, this claim is likewise preempted. *See Newberry*, 854 F.2d at 1147-48; *Young*, 830 F.2d at 999-1000.

C. *Intentional and Negligent Infliction of Emotional Distress*

Wilkinson next argues that his claims for intentional and negligent infliction of emotional distress are not preempted, citing *Tellez v. Pacific Gas & Elec. Co.*, 817 F.2d 536 (9th Cir.), *cert. denied*, 108 S. Ct. 251 (1987).[1] In *Tellez*, the

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[1] Wilkinson also cites *Alpha Beta, Inc. v. Superior Court*, 244 Cal. Rptr. 414 (Cal. App.), *cert. denied*, 109 S. Ct. 392 (1988) and

(Continued on following page)

plaintiff sued PG&E after the company circulated a suspension letter alleging that Tellez had sold cocaine. The court held that Tellez' claims for intentional and negligent infliction of emotional distress were not preempted because the collective bargaining agreement in that case was "silent on work conditions, and vague on disciplinary formalities." *Id.* at 539. Tellez' claims, therefore, would not require interpretation of the collective bargaining agreement. *Id.*

In contrast, when a collective bargaining agreement does specify work conditions and disciplinary procedures, this court has routinely held that claims for emotional distress are preempted. *See, e.g., Newberry,* 854 F.2d at 1149-50; *Hyles v. Mensing,* 849 F.2d 1213, 1216 (9th Cir. 1988). In *Newberry,* this court concluded that the emotional distress claims were preempted because "[a] determination of the validity of her emotional distress claim will require us to decide whether her discharge was justified under the terms of the collective bargaining agreement." 854 F.2d at 1149. Similarly, in *Miller v. AT&T Network Sys.,* the court held that the plaintiff's emotional distress claims arising out of her reassignment and discharge were preempted because the "outrageousness" of the defendant's conduct could depend upon "whether

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Birtell v. Lockheed-California Co., 247 Cal. Rptr. 86 (Cal. App. 1988), *cert. denied,* 109 S. Ct. 869 (1989), for support. In denying review of both of these cases, the California Supreme Court ordered that these opinions not be officially published. *See Birtell,* 247 Cal. Rptr. at 86 n.*; *Alpha Beta,* 244 Cal. Rptr. at 414 n.*. As a consequence, these decisions are not authoritative. *See* Cal. R. of Ct. 977.

[the defendant's] behavior violated the terms of the [collective bargaining agreement]." 850 F.2d 543, 551 (9th Cir. 1988); *see also Hyles*, 849 F.2d at 1216-17 (emotional distress claim against union was preempted because allegations were " 'inextricably intertwined with consideration of the terms of the labor contract' " (quoting *Lingle*, 108 S. Ct. at 1882)). Thus, Wilkinson's claims for intentional and negligent infliction of emotional distress are preempted if their resolution arises out of the same events as his termination from Safeway.

The courts in *Newberry* and *Miller* reached the result they did because the collective bargaining agreement contained rules prescribing when an employee could be discharged. *See Newberry*, 854 F.2d at 1149-50; *Miller*, 850 F.2d at 550-51. An emotional distress claim arising out of an employee's discharge will be preempted if the collective bargaining agreement sets out standards defining when employees may be terminated. Wilkinson alleges that the defendants "remov[ed] and/or restrict[ed] plaintiff's job duties and responsibilities for reasons that were arbitrary. . . ." He further alleged that he was denied promotions, subjected to different standards of conduct from other employees, given unfair performance evaluations, and denied an opportunity to respond to grievances. Wilkinson also alleges that the defendants' conduct prevented him from using seniority benefits to which he was entitled.

Most of these allegations will require reference to the collective bargaining agreement between Safeway and the Union. For example, Article 10 of the collective bargaining agreement outlines certain prerogatives of management concerning the work Wilkinson performed. Thus, a

court deciding whether Safeway arbitrarily restricted Wilkinson's job duties would have to interpret this provision of the agreement. This is also true of Wilkinson's allegations concerning his job duties. The collective bargaining agreement between the Union and Safeway explicitly sets out the duties of various job classifications. Likewise, Wilkinson's complaints about promotions, grievances, and performance evaluations all involve subjects covered by the collective bargaining agreement. Wilkinson's allegations make clear that both these claims would require an interpretation of the collective bargaining agreement and are substantially dependent on an interpretation of the collective bargaining agreement for their resolution. They, therefore, are preempted.

D. *Negligence*

In his fifth cause of action, Wilkinson, in an attempt to bypass the contractual aspects of the collective bargaining agreement and to range freely in the field of torts, alleges that the defendants "engaged in a negligent, careless, and reckless course of conduct to create a working environment detrimental to the health, safety, and welfare of plaintiff. . . ." Wilkinson then repeats the same, more specific allegations contained in his emotional distress causes of action. *See supra* at 6. The effort fails. The preemption gate is shut. As we discussed above, all of these allegations will require an interpretation of the collective bargaining agreement. They, therefore, are preempted. *See supra* at 6-7.

E. *Fraud and Deceit*

The same is true of Wilkinson's sixth cause of action for fraud and deceit. He alleges that he was fraudulently

induced to enter into his employment contract with Safeway with the understanding that he would not be discharged or disciplined except for good cause and that his performance would be evaluated fairly and that certain grievance procedures would be followed. The allegations obviously incorporate the terms of the collective bargaining agreement. Article 7 provides that employees may be discharged for good cause only; Article 6 addresses promotion; and Article 8 sets out the grievance procedures. All of these allegations also are preempted. *See Young*, 830 F.2d at 1001; *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1049 (9th Cir.), *cert. denied*, 108 S. Ct. 504 (1987).

F. *Civil Conspiracy*

In his seventh and final cause of action, Wilkinson claims that all the parties conspired to do all of the wrongful acts alleged previously. The sum of five zeros remains zero, however. As Wilkinson refers to his previous claims, all of which are preempted, his civil conspiracy claim must also be preempted. *See Hyles*, 849 F.2d at 1217.

G. *Public Policy Exception*

Wilkinson, not surprisingly, argues that none of his claims are preempted because his cause of action falls within the public policy exception enunciated in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985). In *Garibaldi*, the plaintiff was terminated after he refused to deliver a load of spoiled milk. California law prohibited the sale or delivery of adulterated milk. *See id.* at 1374. Because Garibaldi

alleged that he was terminated in violation of California public policy, his wrongful discharge claim was not preempted. *See id.* at 1375.

The public policy exception was applied again in *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2819 (1988). In *Paige*, employees were discharged when they refused to refuel gasoline engines under what they considered to be unsafe conditions. The court held that their claims for wrongful discharge were not preempted because Cal/OSHA regulations imposed a duty independent of those imposed by the collective bargaining agreement. *See id.* at 863-64.

Based on *Paige* and *Garibaldi*, Wilkinson argues that he too rendered service to Safeway, its customers, and consumers generally, and that he too should be protected by the public policy exception. He asserts that California law prohibits theft and embezzlement and therefore his actions in reporting these actions were in furtherance of public policy. *See* Cal. Penal Code §§ 182, 484, 532 (West 1988).

The district court rejected Wilkinson's argument, concluding that the public policy exception did not apply to this case because the public was not directly affected by the alleged theft. We are not prepared to accept this reasoning. Nonetheless, it is true that this court has never addressed whether *Garibaldi* extends to the public policy embodied in penal statutes. We need not reach that question in this case. Wilkinson alleges that defendant Braddy falsified his time card and hours worked. In this case, in order for the district court to determine whether Braddy

was being paid for hours he did not work, the district court would have to interpret the collective bargaining agreement provisions addressing such issues as the minimum number of hours for each employee, rest period, travel time, *etc.* Therefore, under *Lingle* and *Allis-Chalmers* this claim is preempted by § 301.

Although we conclude that all of Wilkinson's state law claims are preempted, that does not leave Wilkinson without a remedy. The dismissal of this action alone does not impair Wilkinson's ability to sue under § 301.

AFFIRMED.

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ATTORNEYS FOR Defendants Safeway Stores, Incorporated, Lester Collins and Thomas Braddy

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

DUANE L. WILKINSON, Plaintiff, vs. SAFEWAY STORES, INCORPORATED, a Delaware corporation, LESTER COLLINS, THOMAS BRADDY, DOES 1 through 100, Inclusive, Defendants.	Case No. 87 07855 JSL (GHKx) *ORDER GRANTING MOTION TO DISMISS AND JUDGMENT OF DISMISSAL* Date: December 21, 1987 Time: 1:00 p.m. Place: Courtroom of the Honorable J. Spencer Letts (Filed Jan. 11, 1989)

Defendants Safeway Stores, Incorporated, Lester Collins and Thomas Braddy's Motion to Dismiss, having come on regularly for hearing before this Honorable Court, on December 21, 1987, upon notice regularly and duly served, and defendants appearing by their counsel, Lawrence J. McLaughlin of the law firm of McLaughlin and Irvin, and plaintiff Duane L. Wilkinson appearing by

his counsel, Stephen A. Bost of the law offices of Ives, Kirwan & Dibble, and the matter having been heard, argued, and submitted, and the Court having determined that plaintiff's Complaint and each and every cause of action therein fails to state a claim are preempted by Section 301 of the Labor Management Relations Act, as amended, (29 U.S.C. § 185);

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' Motion to Dismiss be granted in all respects, that the complaint be dismissed in its entirety without leave to amend, that judgment be entered forthwith in favor of defendants on all causes of action, and that defendants be awarded their costs of suit incurred herein.

DATED: 1-11-88

/s/ J. SPENCER LETTS
J. Spencer Letts
Judge of the United States
District Court

SUBCHAPTER IV – LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the

United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, ch. 120, title III, § 301, 61 Stat. 156.)

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No. 89-590

In The

Supreme Court of the United States

October Term, 1989

DUANE WILKINSON,

Petitioner,

v.

SAFEWAY STORES, INCORPORATED, a Delaware Corporation, LESTER COLLINS, and THOMAS BRADDY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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List of Parties

The parties to this proceeding are: Petitioner, DUANE WILKINSON, and respondents SAFEWAY STORES, INCORPORATED, a Delaware Corporation, LESTER COLLINS and THOMAS BRADDY. The Subsidiaries and affiliated companies of SAFEWAY STORES, INCORPORATED other than those which are wholly owned, are:

Controladero de Empresas del Noroestre S.A. De D.V. (Mexico)

Property Development Associates

Winthrop Partnership

Markwind Limited Partnership

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October Term, 1989

DUANE WILKINSON,

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v.

SAFEWAY STORES, INCORPORATED, a Delaware Corporation, LESTER COLLINS, and THOMAS BRADDY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents, SAFEWAY STORES, INCORPORATED, LESTER COLLINS, and THOMAS BRADDY, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's Memorandum decision in this case.

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts in the Memorandum decision below.

REASONS WHY THE PETITION SHOULD BE DENIED

I The Memorandum decision below is not in conflict with previous decisions of this Court, decisions of other circuits, or decisions of the Ninth Circuit.

Petitioner asserts that because the Section 301 preemption analysis in the Memorandum decision below is not solely based upon the "require" language of *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), it is in conflict with that ruling. By reason that the Ninth Circuit also applied the "substantially dependent upon" language of this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), petitioner contends the Memorandum decision fails to follow the holding in *Lingle*. According to petitioner, *Lingle* provides the dispositive analysis to be applied in determining the preemptive scope of Section 301 on state law.[1]

Such an interpretation of *Lingle* is without support. *Lingle* did not overrule *Allis-Chalmers* on the standard of Section 301 preemption as petitioner suggests. *See* Section II, *Infra*. *Allis-Chalmers* is cited and relied upon by this Court in *Lingle*, and the opinion makes it clear that there is nothing inconsistent or novel about the result reached. 108 S.Ct at 1884. In applying both decisions therefore, the decision below in no way conflicts with any decision of this Court.

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[1] It remains, of course, a paradox as to how petitioner can assert this interpretation of *Lingle*, while admitting that it is without support by asking this Court in his first question presented to determine whether the *Lingle* analysis or the *Allis-Chalmers* analysis is the "dispositive" inquiry.

The petitioner further contends that the Ninth Circuit's Memorandum decision is in conflict with the decisions of other circuits. However, no other decision by any other circuit court of appeal is cited by petitioner in support of his contention.

Turning to previous decisions within the Ninth Circuit, petitioner cites *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) and *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, *cert. denied*, 108 S.Ct. 2819 (1988) as conflicting with the decision below. As more fully discussed in Section III *infra*, *Garibaldi* does not stand as an exception to this Court's decisions in *Allis-Chalmers* and *Lingle* on the preemptive scope of Section 301. Rather, the "public policy" exception discussed in *Garibaldi* allows a state law wrongful termination cause of action only if it does not require or is not substantially dependent upon an analysis of the applicable collective bargaining agreement at issue. As the plaintiff's wrongful termination cause of action in *Garibaldi* was squarely based upon his refusal to deliver spoiled milk in violation of California statutory law, no analysis of his collective bargaining agreement was required, and the claim was not preempted. The decision is clearly not inconsistent with the Ninth Circuit's analysis in the decision below.[2]

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[2] Indeed, the *Garibaldi* Court specifically noted that: "In contrast, if Garibaldi had alleged that he was terminated in violation of the collective bargaining agreement, or . . . in violation of an implied covenant of good faith and fair dealing the result might be otherwise." 726 F.2d 1367 at 1374 (citation and footnote omitted.) Petitioner has pleaded both these causes of action.

The *Paige* decision is also consistent with the Memorandum decision. The appellant's cause of action in *Paige* for breach of contract was held preempted because, as in petitioner's action, it was based upon the breach of a collective bargaining agreement. The appellant's cause of action for wrongful discharge in violation of public policy based upon the statutory provisions of Cal/OSHA was found not preempted by Section 301 pursuant to the decision in *Allis-Chalmers*. The *Paige* Court found that: "[t]he resolution of appellants' wrongful discharge claim- . . . depends upon an analysis of Cal/OSHA and California tort law. Since it is not intertwined or substantially dependent upon consideration of the terms of the labor contract, it is not preempted by Section 301." 826 F.2d at 863.

In contrast to *Garibaldi* and *Paige*, the decision below found that petitioner's "public policy" claim based upon alleged timecard violations required an interpretation of the collective bargaining agreement provisions covering such issues, and therefore was preempted under *Lingle* and *Allis-Chalmers*. Accordingly, no conflict exists between the standard of Section 301 preemption analysis applied by the Ninth Circuit in the decision below and the analysis applied in its previous decisions. The differences in the outcome of *Garibaldi* and *Paige* from the decision below are simply based on fact, and do not require resolution by this Court[3]

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[3] As specifically noted by Justice Blackmun in *Allis-Chalmers, supra*: "The full scope of the preemptive effect of federal labor-contract law remains to be fleshed out on a case by case basis." 471 U.S. at 220.

In addition to the lack of conflict in any area raised by the Memorandum decision, it is obvious that the decision is an unpublished disposition pursuant to Rule 36-1 of the Rules of the United States Court of Appeals for the Ninth Circuit. *See* page 1A *infra*. A written, reasoned disposition of a case or motion which is not intended for publication under Rule 36-2 (disposition by opinion) is a Memorandum. *See* page 1A-2A *infra*. Pursuant to Rule 36-3 (page 2A *infra*), Memorandums are not regarded as precedent and cannot be cited to or by the Ninth Circuit or any district court of the Ninth Circuit in briefs, oral argument, opinions, memorandum or orders.

The decision below, therefore, is of no precedential value. Even assuming *arguendo* petitioner's allegations of conflict are valid, the decision below cannot be relied upon or cited as a decision inconsistent with the opinions in *Paige* and *Garibaldi*. Accordingly, the dispute is limited solely to the parties, and does not constitute an issue necessitating this Court's authoritative voice.

II The first question presented by petitioner does not seek resolution of any issue of conflict or confusion among the circuit courts, but rather asks this Court to reexamine and review its settled decisions in *Allis-Chalmers* and *Lingle*.

The first question as presented by petitioner asks this Court to choose between the preemptive scope analysis set forth in *Allis-Chalmers*, which holds claims are preempted by Section 301 if they are "substantially dependent upon" the interpretation of a collective bargaining agreement, and the analysis in *Lingle*, which holds such

claims are preempted if they "require" the interpretation of a collective bargaining agreement. Resolution of this question as phrased contemplates an overruling of the analysis of one or both of the decisions.

To depart from the doctrine of *stare decisis* requires substantial justification, especially in the area of statutory interpretation such as in the case at hand. *Patterson v. McClean Credit Union*, 109 S.Ct. 2263, 2370 (1989) *quoting Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Substantial justification, as defined by this Court, requires that: (1) The decision must be undermined by subsequent changes or developments in the law, *Patterson, supra* at 2370-71; (2) The decision must be irreconcilable with competing doctrines or policies, *Id.*; (3) The decision must be a positive detriment to coherence and consistency in the law because of confusion created by an unworkable decision, *Patterson, supra*, citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977); *Swift & Co. v. Wickham*, 382 U.S. 111, 124-25 (1965), and (4) The decision poses a direct obstacle to the realization of important objectives embodied in other laws. *Patterson, supra*, citing *Rodriguez de Quijas v. Shearson American Express, Inc.*, 109 S.Ct. 1917 (1989); *Boy's Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 240-41 (1970).

In the labor law area, the foregoing criteria must also be examined in light of the overall Congressional and federal policy to promote a uniform body of federal labor law, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and to promote the peaceable and consistent resolution of labor management disputes, *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

In view of these considerations, no sufficient reason is given as to why certiorari should be granted on the issues raised in petitioner's first question. Absolutely no showing is made that the rulings in *Allis-Chalmers* and *Lingle* on the issue of Section 301 preemption have been undermined by subsequent changes or developments in the law or are irreconcilable with competing doctrines or policies. Similarly, no evidence in the record exists to show that the decisions pose an obstacle to objectives embodied in other laws.

The strongest argument implicit in petitioner's first question is that the decisions are a detriment to coherence and consistency in the law by creating an unworkable standard. However, the practical application of *Allis-Chalmers* and *Lingle* by the Ninth Circuit belies this assertion. In *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142 (9th Cir. 1988), the Ninth Circuit was directly confronted with the question of Section 301 preemption of state tort law claims and the same argument petitioner makes that such claims existed separate from the plaintiff's collective bargaining agreement. In determining the proper standard of analysis, the Ninth Circuit stated:

> We recognize that Section 301 does not preempt every employment dispute tangentially involving the labor agreement, *Lingle*, ___ U.S. ___ at ___, 108 S.Ct. at 1881-83, and will proceed to analyze the appellant's contentions under the Supreme Court's twin tests, without indicating or suggesting that the tests do in fact differ: Does the application of State law 'require [the] interpretation of a collective bargaining agreement,' *Lingle*, ___ U.S. at ___, 108 S.Ct. at 1885, or 'substantially depend [upon] the terms of an agreement made between the parties in a labor

contract?' *Allis-Chalmers*, 471 U.S. at 220, 105 S.Ct. at 1916.

854 F.2d at 1147.

Newberry demonstrates that the intervention of this Court sought by petitioner's first question is unnecessary as a matter of law, and also as measured against the import of issues in the labor law area where certiorari has traditionally been granted.

As to the merits of petitioner's action, *Newberry* was specifically applied in the decision below, and a consistent result was reached.[4] Clearly, the Ninth Circuit has adopted both rulings which, of course, are predicated upon the perpetuation of underlying federal labor law principles originally set forth in *Lincoln Mills* and *Lucas Flour*. No resulting detriment to the coherence and consistency in the application of Section 301 preemption to state law claims is raised by this petition. In sum, there is absolutely no reason why this Court should issue a writ of certiorari to resolve the first question presented by petitioner.

III The second question presented by petitioner has already been answered by this Court's decisions in *Allis-Chalmers* and *Lingle*.

The Section 301 preemption analyses set forth in *Allis-Chalmers* and *Lingle*, based upon the long-standing federal labor law principles in *Lincoln Mills* and *Lucas Flour* govern the viability of any state law claim where

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[4] The correctness of the Memorandum decision is discussed in Section IV, *infra*.

the provisions of a collective bargaining agreement are implicated. Whether the state law claims are pleaded under contract, tort, or "public policy" theories is irrelevant to the application of preemption analysis. The overriding question of whether a state action is preempted by federal law is one of Congressional intent, not the nature of the state action. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Allis-Chalmers, supra* at 208.

Contrary to the implications raised in petitioner's second question presented, *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) does not operate as a separate exception to Section 301 preemption. Although *Garibaldi* was decided prior to this Court's decisions in *Allis-Chalmers* and *Lingle*, the decision was predicated upon the same preemption analysis traditionally employed to determine Congressional intent concerning the state law in question. *Garibaldi, supra*, 726 F.2d at 1372-76. No action is therefore required of this Court to determine an area of law that it has already settled.

An argument similar to that raised by petitioner herein was raised in *Lingle*. In *Lingle*, the petitioner argued that the Illinois right to be free from retaliatory discharge was non-negotiable, and applied to both unionized and non-unionized workers. In response to the assertion that such a state right would automatically escape the preemptive scope of Section 301, this Court stated:

> While it may be true that most state laws that are not preempted by § 301 will grant non-negotiable rights that are shared by all state workers, we note that neither condition insures

> nonpreemption. It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective bargaining agreement for its application. Such a remedy would be pre-empted by § 301. Similarly, if a law applied to all state workers but required, at least in certain instances, collective bargaining agreement interpretation, the application of the law in those instances would be preempted. Conversely, a law could cover only unionized workers but remain unpreempted if no collective bargaining agreement interpretation was needed to resolve claims brought thereunder.

108 S.Ct. 1882, n.7.

Clearly, there is no basis in the law for the petitioner's proposition that a state tort cause of action based upon "public policy" can exist simultaneously if the resolution of the claim would require or be substantially dependent upon the interpretation of the applicable collective bargaining agreement at issue. The second question presented merely seeks to resolve the same issues presented to and previously adjudicated by this Court in *Allis-Chalmers* and *Lingle*.

IV The Memorandum decision correctly applied the Section 301 preemption principles set forth in *Allis-Chalmers* and *Lingle*.

The issues raised by petitioner in the questions presented need not be resolved to determine that the Memorandum decision of the Ninth Circuit was rendered in accordance with the established precedent of this Court.

Petitioner simply continues to seek appellate relief from the allegations of his own Complaint, which clearly predicate each and every cause of action upon an alleged breach of his collective bargaining agreement. A review of the Memorandum decision (Appendix 1A-11A in the Petition) finds that each cause of action was specifically addressed and analyzed by the Ninth Circuit according to the "require" language of *Lingle* and the "substantially dependent upon" language of *Allis-Chalmers*.

Under the *Lingle* standard, which is arguably more stringent than that set forth in *Allis-Chalmers*, the Ninth Circuit found that each and every cause of action *required* an interpretation of petitioner's collective bargaining agreement and was therefore preempted under Section 301. Thus, petitioner's first question is wholly irrelevant to the merits of his action, as his state contract and tort claims were found preempted under the stricter requirements of *Lingle*, and would necessarily be preempted under the less stringent *Allis-Chalmers* standard.

Moreover, as set forth by respondents in their argument to the Ninth Circuit, petitioner's allegations of violations of public policy based upon California penal statutes were not alleged in his Complaint. Allegations that petitioner was acting to effectuate such statutory provisions were first asserted on his appeal to the Ninth Circuit. Petitioner's claims of wrongful termination are solely based upon breach of contract and breach of the implied covenant of good faith and fair dealing. Accordingly, allegations of wrongful termination in violation of public policy are not properly in the record nor are they properly before this Court.

Even assuming *arguendo* that the issue is properly before this Court, petitioner cannot maintain a cause of action for wrongful termination, as he has failed, unlike the plaintiffs in *Garibaldi* and *Paige*, to allege a cause of action for tortious wrongful discharge or any violation of public policy involving state interest inuring to the benefit of the public in general. *See DeSoto v. Yellow Freight Systems, Inc.*, 811 F.2d 1333 (9th Cir. 1987) (Plaintiff must act in defense of a public policy of the State of California and not simply assert his own interpretation of the law.) Petitioner's alleged violation of timecard procedures rather, is clearly encompassed within the terms of his collective bargaining agreement. *See also Evangelista v. Inland Boatman's Union of Pacific*, 777 F.2d 1390 (9th Cir. 1985). The decision below correctly and fairly found petitioner's causes of action preempted by Section 301 according to the precedent of this Court. Accordingly, none of the traditional circumstances in which certiorari is granted are present, and the petition should be denied.

V CONCLUSION

For these reasons the Petition for Writ for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Rule 36-1. Opinions, Memoranda, Orders; Publication

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

Rule 36-2. Disposition by Opinion

A written, reasoned disposition shall be designed as an OPINION only if it:

(a) Establishes, alters, modified or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Rule 36-3. Other Dispositions

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.